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No. 82-143

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PEOPLE OF THE STATE OF ILLINOIS,

Respondent,

vs.

JAMES D. COLE, SR. and JAMES D. COLE, JR.,

Petitioners.

On Petition For Writ Of Certiorari
To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Supreme Court of the State of Illinois correctly held that the trial and conviction of the Defendants, James D. Cole, Sr. and James D. Cole, Jr., for the offense of Solicitation To Commit Murder did not violate the constitutional bar against double jeopardy.

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REASON FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

THE DECISION BELOW DENYING THE CLAIM OF A DOUBLE JEOPARDY VIOLATION WAS CORRECT AND REFLECTS PREVIOUS DECISIONS OF THIS COURT.

The general purpose of the Double Jeopardy Clause of the Fifth Amendment is "to protect an individual from being subjected to the hazards of trial and possible con-

viction more than once for an alleged offense." *Green v. United States*, 355 U.S. 184, 187 (1957). A variety of claims raising double jeopardy issues have been examined by this Court. (See catalogue: *United States v. DiFrancesco*, 449 U.S. 117, 126-131 (1980).) The dispositive rulings regarding the permissibility of reprosecution after declaration of a mistrial must serve as the basis of adjudication of the instant Petition for Writ of Certiorari.

This Court has long recognized that government may reprosecute absent a final judgment in the initial proceedings. *United States v. Perez*, 9 Wheat 579 (1824); *Wade v. Hunter*, 336 U.S. 684 (1949); *United States v. Jorn*, 400 U.S. 470 (1971); *Illinois v. Somerville*, 410 U.S. 458 (1973); *United States v. Dinitz*, 424 U.S. 600 (1976); *United States v. Martin Linen Supply Company et al.*, 430 U.S. 564 (1977); *Lee v. United States*, 432 U.S. 23 (1977); *Arizona v. Washington*, 434 U.S. 497 (1978).

In the instant case, a mistrial was declared as to Count II of a multicount indictment. Count II of the indictment stated an alternative basis for determination of guilt or innocence to the charge of solicitation (to commit murder) by encouraging a third party to murder the intended victim. *People v. Cole, et al.*, 61 Ill. Dec. 793, 435 N.E.2d 490 (1982). The petitioners were retried on Count II and were convicted. The Illinois Supreme Court relying on the rule that a mistrial ruling invariably rests on grounds consistent with reprosecution, *Lee v. United States*, 432 U.S. 29 (1977) found no violation of the constitutional guarantees against double jeopardy.

A reviewing court is mandated to judge whether there is a "manifest necessity" for the declaration of a mistrial

that results in exposure to reprosecution. *United States v. Perez*, 9 Wheat at 580. For a mistrial is not considered a final judgment in favor of a defendant that would automatically bar reprosecution. *Illinois v. Somerville*, 410 U.S. 458 (1973). However, an inability of a jury to return a verdict has traditionally been accepted as justification for reprosecution. *Logan v. United States*, 144 U.S. 263 (1892); *Dreyer v. Illinois*, 187 U.S. 71 (1902); *Keerl v. Montana*, 213 U.S. 135 (1909); *United States v. Martin Linen Supply Company, et al.*, 430 U.S. at 570; *United States v. Sanford*, 429 U.S. 14 (1976).

The petitioners premise their claim of error by the court below on an unwarranted assumption. They claim that the disparate results of the jury deliberations, acquittal on one count and inability to reach a final determination on the other count, should be viewed as termination in the petitioners' favor. (Petitioners' Brief, pp. 6-7). The law is clear, however, that consistency in verdicts on several counts of an indictment is not required and each count should be viewed as a separate indictment. *Dunn v. United States*, 284 U.S. 390 (1932); *Hamling v. United States*, 418 U.S. 87 (1974). The acquittal on one count of the indictment does not effect the absence of the finality of judgment requirement necessary to bar reprosecution on the other indictment count.

CONCLUSION

It is the contention of the respondent that the decision of the court below, rejecting the claim of a double jeopardy violation because a mistrial disposition does not constitute a final judgment precluding reprosecution, is correct and in conformity with the previous decisions of this Court. For this reason, the respondent respectfully requests this Court to deny the petitioners' request for issuance of a Writ of Certiorari.

Respectfully submitted,

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